

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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77-1499

To be argued by
STEPHEN GILLERS

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

JOSE ANTONIO MANZUETA,

Defendant-Appellant

*Appeal from the United States District Court for the Southern
District of New York*

BRIEF FOR DEFENDANT-APPELLANT

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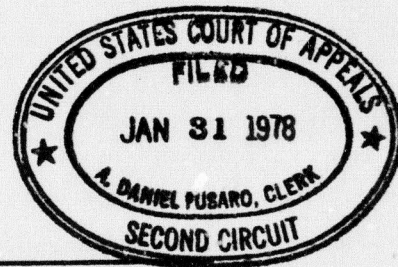


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Plaintiff-Appellee,

-against-

JOSE ANTONIO MANZUETA,

Defendant-Appellant.

- - - - -X

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction imposed by Hon. Frederick vanPelt Bryan following a jury trial. The defendant was convicted of unlawfully possessing and attempting to pass a counterfeit fifty dollar (\$50.00) federal reserve note. 18 U.S.C. §472. He was sentenced to three and one half years imprisonment pursuant to 18 U.S.C. §3651, with the provision that he be confined in a jail type institution for a period of six months with the balance of the sentence suspended and the defendant placed on probation for three years. The defendant was represented at trial and is being represented on appeal by court appointed counsel.

ISSUES PRESENTED

(1) WERE STATEMENTS OF THE DEFENDANT INTRODUCED IN VIOLATION OF HIS MIRANDA RIGHTS, EITHER BECAUSE (A) THE GOVERNMENT FAILED TO MEET ITS BURDEN OF PROVING WAIVER; OR (B) PEDIGREE INFORMATION WAS TAKEN AFTER DEFENDANT REQUESTED A LAWYER?

(2) DID THE TRIAL COURT ERRONEOUSLY ADMIT PRE-ARRAIGNMENT STATEMENTS BY THE DEFENDANT TAKEN DURING THE PERIOD OF "UNNECESSARY DELAY"?

STATEMENT OF THE CASE

There was a brief jury trial preceded by a suppression hearing. We summarize the facts at the hearing first.

THE SUPPRESSION HEARING

Anthony Garvey

Garvey was a police officer for the City of New York, who, at about 12:50 P.M. on July 5, 1974 responded to a call from the owner of Smalls Liquor Store on Eighth Avenue in Manhattan. Officer Murray also responded. (12)* Angelo Mimms, who worked in the store, told Garvey that Manzueta had come into the store

* Parenthetical references are to pages of the trial transcript.

and attempted to purchase liquor with a counterfeit fifty dollar bill. (13)* Mimms also told Garvey that Manzueta had offered Mimms money to let Manzueta leave the store after Mimms had locked the door. (14) It was stipulated that the bill Manzueta allegedly attempted to pass was counterfeit. (15)

After Garvey talked to Mimms and examined the bill, he arrested Manzueta and took him to the stationhouse where he was searched and interviewed by Officer Mercado, who Garvey testified spoke Spanish. (17-18) When Agent Horton of the Secret Service came to the stationhouse in response to a telephone call, Garvey gave him the fruits of his search of Manzueta. (19) These included two additional counterfeit bills seized by Officers Mercado and Cullen from a gypsy cab parked across the street from the liquor store. (21) One of the additional bills had the same serial number as the bill Manzueta allegedly attempted to pass at the liquore store. (25)

Samuel Mercado

Mercado interviewed Manzueta at the stationhouse at Garvey's request. (27) The interview took place at about 1:00 P.M. Prior to it, Mercado gave Manzueta his rights in Spanish.

* Garvey could not remember whether it was Smalls, the owner of the store, who told him this, or Mimms, a clerk. He thought it was Smalls, but other testimony indicated it was Mimms, and to avoid confusion, we will use Mimms throughout.

(29) He did this by reading from a form on which the rights were printed in English while translating simultaneously. (30) An objection that the rights were inadequately given is overruled "at this point". (30)

Manzueta told Mercado that he understood his rights and then explained that he had gotten the counterfeit from the driver of a cab in which he was a passenger. (35) When asked about car keys and a car registration found on Manzueta's person, Manzueta replied that they were for a car under repair at a different location, not near the liquor store. (36) Mercado and Cullen thereafter searched for the car and found it across the street from the liquor store. The search of the car yielded the two additional counterfeit bills beneath the rear seat. (37) The bills and an explanation of their location were given to Horton. (40)

On cross-examination, defense counsel attempted to show Mercado's Spanish speaking ability. (44) Mercado translated "waiver" with a Spanish phrase that had the following English meaning: "You have the right not to take your rights."* Mercado adopted this definition of the interpreter's translation of his Spanish translation. (45) But Mercado also emphasized that he did not recall if those were the particular words used to translate the word "waiver" when he interviewed Manzueta.

* The translation from Mercado's Spanish to English was done by the court appointed interpreter who was in court because Manzuetta claimed that he did not understand or speak English.

Mercado then translated the words, "You have a right to a lawyer" into Spanish and the interpreter translated Mercado's translation into the same English sentence. (46)

Mercado was then asked to translate the English sentence: "If you cannot afford an attorney, one will be provided to you without cost." The interpreter translated Mercado's Spanish translation as follows:

"INTERPRETER: If you don't have the money for a lawyer -

Q. you use the word 'apuntara'. For the record would that be spelled A-P-U-N-T-A-R-A?

A. I guess so.

INTERPRETER: Aponta [the transcript should read 'apuntar'] in Spanish means to appoint. One would be given to you. That [meaning 'apuntara'] means I will be to appoint. That would be translating from the English to the Spanish that way."
(46-47)

Mercado testified that he was born in Puerto Rico but came to the United States at age six months and did not take Spanish in school. (43, 47)

Harry Horton

After Horton came to the police station, learned of the counterfeit bills and the car, he took Manzueta and the car back to the secret service office. (56-7) He did not speak to Manzueta because he understood that Manzueta spoke only Spanish. (58) Two days later on Monday, July 7, 1975, John Simon, a Spanish speaking secret service agent, questioned Manzueta at the secret service field office. (62-63) Subsequently, on the

same day, Manzueta was interviewed at the United States attorneys office by Mr. Costello, who read Manzueta his rights from a form in Spanish. (68-69) Manzueta indicated that he would like a lawyer, but before he got one, Costello took pedigree information from him. (69-70)

John Simon

Simon, a secret service agent, testified that he interviewed Manzueta on July 7 after first giving him his rights in Spanish. Simon learned Spanish at home, from his parents, who are from Spain (74-75). The defendant also signed a waiver at this time. (77)

Simon testified from memory what the defendant told him two years earlier. Simon did not make a written record. (77)

Over objection, (85-87) the court ruled the statements to Simon, to Mercado, and to Assistant U.S. Attorney Costello all admissible. (92-94)* Left open is the question whether the pedigree information, although admissible, as voluntary, was relevant. (104-05)

THE TRIAL

Angelo Mimms

Mimms was employed as a clerk in Smalls Liquor Store,

* The court also admitted over objections the two additional counterfeit bills found under the back seat of the car. This point is not argued on appeal.

which was owned by his father. (107) On July 5, 1975, a customer walked in, ordered scotch, paid with a bill which Mimms believed to be a counterfeit fifty, and Mimms said to the customer: "Why are you trying to get over on us?" (108-09)

After a conversation with the customer, in which the customer professed ignorance of any problem, Mimms locked the front door to the store. The customer then told Mimms that he got the bill from a numbers man and offered Mimms the money in his pocket, which Mimms estimated to be about two hundred dollars, to return the bill and let him go. (109) Mimms refused, calling the police instead. (113)

Mimms testified that in his opinion the customer spoke English, but also indicated that he believed that anyone who could say "Johnny Walker" knows English. (136)

Anthony Garvey

Garvey testified as he did at the suppression hearing. In addition, he testified that he had no conversation with Mimms at the store, because there were "communication problems, as best I can recall with Mr. Manzueta." (152) "He spoke little or broken English." (152)

Samuel Mercado

Mercado also testified as he had at the suppression hearing, adding that Manzueta had told him, during their conver-

sation at the stationhouse after Mercado had given Manzueta his rights in Spanish, that Manzueta had obtained the bill from a gypsy cab driver who had told him to purchase liquor with it. Manzueta told Mimms that he was a passenger in the cab. (167-68)

Harry Horton

Horton testified as he had at the suppression hearing. After Manzueta was delivered to Horton's custody, he took him to the secret service field office at the World Trade Center. There (by this time it was evening), Manzueta was photographed and printed. He was then brought to the Federal Detention Center. (220-21) Two days later, on Monday, July 7, Horton picked Manzueta up at the detention center and took him to "our field office so a Spanish speaking agent from our Service could interview him with regard to these notes. Subsequent to that interview he was transported to the Southern District of New York for judicial proceedings." (221)

The court subsequently ruled that the prosecutor would be allowed to introduce in evidence the fact that Manzueta had been driving a gypsy cab for a year and a half. This information had been obtained by the prosecutor from Manzueta as pedigree information after his arrest and before his arraignment. (243) The information was read to the jury. (245)

Prosecutor's Summation

In his summation, the prosecutor argued to the jury the statement to Officer Mercado (280) and the statement to Agent Simon (282) and the contradiction between them (285). To strengthen his argument that Manzueta knew the bill was counterfeit, he asked whether it is "likely that Mr. Manzueta would not recognize a counterfeit fifty dollar bill. He's a taxi driver. He handles money all day long. Who is more likely to recognize counterfeit money than a taxi driver?" (282) Earlier, he had also emphasized the fact that Manzueta was a taxi driver for a year and a half in asking the jury to disbelieve Manzueta's claim that he did not speak English. "Ask yourselves how likely it is that a person who has been driving a taxicab for a year and a half in New York does not speak English." (279)

ARGUMENT

POINT I:

THE DEFENDANT'S MIRANDA RIGHTS WERE VIOLATED BECAUSE (A) THE GOVERNMENT FAILED TO MEET ITS BURDEN OF PROVING THAT HE WAIVED THEM KNOWINGLY; AND (B) THE ASSISTANT UNITED STATES ATTORNEY TOOK INCRIMINATING PEDIGREE INFORMATION FROM DEFENDANT AFTER HE HAD ASKED FOR A LAWYER IN RESPONSE TO AN OFFER OF ONE.

There is No Proof of Waiver

A "heavy burden rests upon [the Government] to prove that a person in custody did knowingly and intelligently waive his privilege against self-incrimination and his right to retained or appointed counsel. ..." United States v. Sledge, 546 F.2d 1120 (4th Cir. 1977), cert. den. U.S. , 97 S. Ct. 1185 (1977). See also Miranda v. Arizona, 384 U.S. 436, 475 (1966).

Here, the defendant maintained that he did not speak English. Officer Mercado was the first person to give him his Miranda rights. They were given by translating from an English version. Officer Mercado showed that he was incapable of making the translation. He was unable to translate "waiver" in a simple way. He was unable to communicate to Manzueta that the government would appoint a free lawyer if Manzueta could not afford one. He did not even tell Manzueta that the lawyer appointed would be free.

Defendant argues that the government has not met its burden of proving that Mercado adequately gave Manzueta his Miranda rights. The cases on adequacy of an interpreter are few. See United States v. Desist, 384 F.2d 889, 901 (2d Cir. 1967). But if the burden on the government is "heavy" it was not met here. Mercado had no formal education in Spanish. The government produced no qualifications upon which the court could rely for a finding that he was adequate to be an interpreter. His translation ability in court at the suppression hearing indicates his skills lie elsewhere.

The statements made to Mercado were used by the government in its summation. Furthermore, if they were inadmissible, they may have tainted the admissibility of the subsequent statements made to Agent Simon. United States ex rel. Hughes v. McMann, 405 F.2d 773, 777 (1968).

The Incriminating Pedigree Statement

The Assistant United States Attorney continued to ask Manzueta pedigree question, prior to his arraignment, prior to the appointment of counsel, even after Manzueta had requested a lawyer in response to the assistant's Miranda warnings. Whatever the validity of a pre-arraignment "detour" to the prosecutor's office, United States v. Duvall, 537 F.2d 15 (2d Cir. 1976) establishes that "prosecutors engaging in such a practice at least must be particularly scrupulous to observe the cautions of Miranda. ... " 537 F.2d at 24. Although there the court spoke

to Miranda's cautions that the accused not be "threatened, tricked or cajoled into a waiver," we see no reason why the rule should be different where the prosecutor, having offered free counsel pursuant to Miranda, his offer having been accepted, proceeds to elicit incriminating pedigree information from the defendant. The prosecutor should not be allowed to ignore the acceptance of his mandated offer.

The information retrieved this way - that the defendant was a gypsy cab driver and had been one for a year and a half - was twice emphasized by the prosecutor on summation. (279, 282)

United States ex rel. Hines v. LaVallee, 521 F.2d 1109 (2d Cir. 1975), upon which the lower court relied, is different. First, the Hines court gave "harmless error" as an alternate ruling. Second, in Hines, the pedigree information was required "for booking purposes." Here, the nature and length of the defendant's job was not. Third, in Hines, the defendant had made the incriminating pedigree admissions without having been given any warnings whatsoever. Here, the defendant was explicitly offered counsel and accepted, and then the acceptance was ignored. Fourth, in Hines, the court stressed that the "safest and simplest course for an arresting authority, now usually followed, is to warn the suspect of his constitutional rights before any questioning at all whether or not it is investigative in nature." 521 F.2d at 1112. Finally, Hines was a collateral attack on a state conviction. This is a direct appeal.

In addition, even a freshman prosecutor must recognize the usefulness, on the scienter issue in a counterfeiting case, of proof that the defendant worked for a time in a job involving taking cash from the public. Such information should not be permitted to be elicited, in the absence of counsel and after one has been requested, under the guise of a pedigree rubric.

POINT II:

STATEMENTS TO AGENT SIMON WERE OBTAINED
DURING A PERIOD OF UNNECESSARY DELAY AND
SHOULD HAVE BEEN EXCLUDED

The defendant was arrested on Saturday, July 5 at about noon. That evening, he was brought to the Federal Detention Center. The next day was Sunday. The following day, Monday morning, he was picked up at the detention center and brought to the secret service headquarters. Why? "So a Spanish speaking agent from our Service could interview him with regard to these notes." (221)

Whatever the validity of the pre-arraignment "detour" to the prosecutor's office for pedigree information - compare United States v. Duvall, 537 F. 2d at 23-24 n. 9 with United States v. Ortega, 471 F.2d 1350, 1362 (2d Cir. 1972)-here we have an unrelated "excursion" for the express purpose of interrogation. The defendant had already been in the custody of the state and federal authorities from Saturday noon until Monday morning, with no proof offered that he had had any contact with the outside world. The courts

were open on Monday. Why was he not brought to a magistrate immediately? Rule 5(a) Fed. R. Cr. P.

There are two sources of law against which the facts of this case must be measured. This court has never held that 18 U.S.C. §3501 has overruled the McNabb - Mallory rule. McNabb v. United States, 318 U.S. 332 (1943). Mallory v. United States, 354 U.S. 449 (1957). Many recent cases analyze the facts before them under both McNab-Mallory and Section 3501. United States v. Ortega, 471 F. 2d at 1362. United States v. Johnson, 467 F.2d 630, 635 (2d Cir. 1972). United States v. Collins, 462 F.2d 792, 795 (2d Cir. 1972) (but expresses some uncertainty). United States v. Marrero, 450 F.2d 373, 376-77 (2d Cir. 1971).

Under the McNab-Mallory standard, taking Manzueta to secret service headquarters on Monday July 7 violates Rule 5(a). The statement obtained from him there occurred during a period of "unnecessary delay". The court was open. There was no need to bring Manzueta to the headquarters first. The candidly stated reason for bringing him there - to question him - is especially impermissible.

This case is different from United States v. Collins supra., where, during the conference in the assistant U.S. Attorneys Office to obtain pedigree information, Collins confessed. It is different because Collins confessed while the authorities were proceeding on a direct course to bring him before a magistrate. The only variance in Collins, was that the confession came during a

prosecutorial, pre-arraignment "detour".

Here, however, the statement came not during a "detour", but during an entirely separate and entirely unnecessary side trip. The statement should have been suppressed.

The other source of law for an analysis of the facts here is 18 U.S.C §3501. But that section has been weakened, if not mortally wounded, by the strained interpretation in United States v. Marrero, 450 F.2d at 377-78, which seems able to reach the conclusion it does only by reading "solely" out of §3501(c). Other than to suggest that the court might wish to consider the logic of Marrero, Manzueta makes no additional arguments under §3501.

CONCLUSION

The conviction should be reversed for a new trial.

Respectfully submitted,

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Stephen Gillers

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

JOSE ANTONIO MANZUETZ,
Defendant-Appellant,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 31st day of January 1978 at 1 St Andrews Plaza
New York, N. Y.

deponent served the annexed

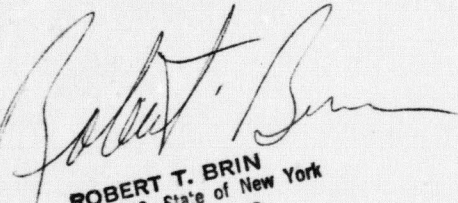
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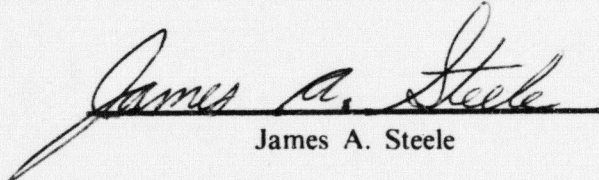
Robert Fiske

Brief

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 31st
day of January, 1978


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979


James A. Steele

